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NOTES

PRIVATE INTERNATIONAL COURIERS: A CHALLENGE TO THE WEST GERMANY POSTAL MONOPOLY AND EEC LAW*

INTRODUCTION

Private international couriers¹ (couriers) have developed in the last fifteen years to accommodate the needs of the changing business world. Couriers offer overnight express service allowing door-to-door delivery of documents across national and international boundaries. Although national postal authorities have simultaneously improved their mail service, couriers meet a demand that government agencies—whose services are limited to national boundaries—cannot fulfill.

West Germany has been among the countries that have challenged the establishment of the courier industry as an intrusion upon existing national postal monopolies. The law of West Germany authorizes the federal government to operate a postal monopoly.² The monopoly reserves the right to forward written correspondence and

* In the summer of 1984, the Author worked at the law firm of Rossbach & Kirchner in Frankfurt, West Germany. Research done during that summer inspired the topic of this Note. The Author benefited greatly from meeting those who are involved in the controversy in West Germany and is indebted to James I. Campbell, Jr. and Ralf Wojtek, whose expertise has been a major force in shaping postal monopoly law. The Author expresses her special gratitude to Johann-Andreas Rossbach.

1. This term refers to private corporations that provide international express delivery service for various types of documents. Airborne, DHL-Worldwide, Emory, and Federal Express are examples of private international couriers. The industry has grown tremendously since the first private international couriers began operating in 1970. Couriers now carry an average of 10 million pieces per year to produce a market value of approximately \$4 billion dollars. E. KAUFER, *DIE BEDEUTUNG INTERNATIONALER KURIERDIENSTE IM INTERNATIONALEN HANDEL* 5 (1985).

2. In pertinent part, section 2 of the Postal Law states:

- (1) The establishment and operation of facilities for commercial forwarding of shipments containing written correspondence or other communications from person to person is reserved exclusively to the German Federal Postal Service.
- (2) "Forwarding" as used in (1) above includes all tasks relating to collecting, transmitting, or delivery to the receiver.
- (3) "Communications" used in the sense of (1) is not to be so regarded if it is
 1. a communication that is attached to and related exclusively to another shipment; or
 2. returned printed matter.
- (4) The Bundesminister for Postal and Telecommunications, or those under his authority, may grant an exemption from the postal monopoly in special cases.

other person-to-person communications exclusively to the West German Federal Ministry for Posts and Telecommunications (Bundespost).³

Recently, the West German government addressed the relationship of private international couriers and the postal monopoly. Couriers⁴ and the Bundespost entered into an agreement (the November Agreement) that exempts private international couriers from the postal monopoly.⁵ The exemption is based on the unique administrative advantages that allow couriers to guarantee fast, reliable, door-to-door delivery under the supervision of a single entity.⁶

The November Agreement reflects a reversal of the Bundespost's position. Under a previous arrangement known as the February Agreement, the Bundespost contended that its monopoly extended to all routes where its service was "as fast and as reliable" as that of the private international couriers.⁷ The February Agreement was unacceptable to the couriers because it failed to define their status clearly: the phrase "as fast and as reliable" in the February Agreement made the couriers' legal right to operate subject to the development and expertise of Datapost, the Bundespost's own express service. The November Agreement, by contrast, defines a sphere of activity within which the couriers may operate regardless of how efficient the government's service becomes.

This Note will demonstrate that the effect of the November Agreement is consistent with West German law and the law of the European Economic Community (EEC). Because the November Agreement is non-binding, the significant issue is not whether the Agreement itself is consistent with West German law and EEC law, but whether the new status quo of the parties established by the Agreement is acceptable under both legal regimes.

Section I traces the development of the courier industry and postal service and presents the traditional justifications for a national postal monopoly. Section I also describes the parties and the previous status quo established by the February Agreement. Section I con-

The exemption may be based on conditions or fees, especially the required payment of an appropriate one-time or continual lost-revenue fee.

Gesetz über das Postwesen [PostG] § 2, 1969 Bundesgesetzblatt [BGBl] I 1006 (W. Ger.).

3. PostG § 2(1).

4. The couriers have banded together in an organization called the Bundesverband Internationaler Kurierdienste (BIK) (National Association of Courier Services). BIK members contribute proportional shares toward fees for legal counsel.

5. See *infra* notes 54-61 and accompanying text.

6. See *infra* note 54 (private international couriers transport messages across national borders without surrendering control to another agency); see also *infra* notes 32-40 and accompanying text (discussing differences between postal and courier operations).

7. See *infra* notes 42-53 and accompanying text.

cludes by discussing the defects in the February Agreement and setting out the terms of the November Agreement. Section II identifies the legal provisions under West German and EEC law that are relevant to the scope of the postal monopoly as it is affected by the November Agreement. Section III establishes the non-binding nature of the Agreement and analyzes the new status quo achieved by the Agreement under both West German and EEC law. Section III then addresses future applications of the Agreement. The Note concludes that the November Agreement's effects, or the new status quo, comport with both West German and EEC law.

I. BACKGROUND

The notion of a monopoly is contrary to the concept of a free market economy, and states that advocate a competitive market structure tolerate monopolies only to the extent that the monopoly serves an overriding state interest.⁸ West Germany, both as an independent sovereign and as a member of the European Economic Community, is committed to a free market economy.⁹ As a general proposition, therefore, West Germany's monopoly should be narrowly construed. Whether courier services should be included within the scope of the postal monopoly depends on whether ordinary postal services and courier services are distinguishable.

A. HISTORICAL DEVELOPMENT

Couriers and postal services developed in response to two distinct demands. From earliest times, governments, merchants, and private individuals employed couriers to deliver messages of special importance.¹⁰ Until literacy spread throughout the general population, however, this demand was confined primarily to governments. Governmental bodies employed their own couriers when a special need for

8. W. FRIEDRICH, RECHTSKUNDE FÜR JEDERMANN 322 (1984).

9. See generally *id.* at 332-42; H. COING, EPOCHEN DER RECHTSGESCHICHTE IN DEUTSCHLAND 110-22 (1981); G. KÖBLER, RECHTSGESCHICHTE 246-49 (1982). These authors all emphasize the care West Germany has taken to avoid concentrations of power in the aftermath of the Nazi regime. While tolerant of some state intervention for social purposes, the West German economy is based on the concept of a free market and relies on the responsible conduct of market participants. H. COING, *supra*, at 118. West Germany furthered this commitment to the principles of the free market by entering the European Economic Community in 1957. See *infra* notes 69-73 and accompanying text.

10. The earliest historical records contain evidence of postal systems. Among others, the Twelfth Pharaonic Dynasty in Egypt (circa 2000 B.C.), the Chou Dynasty in China (1122-225 B.C.), and the Roman Empire all employed couriers in the administration of their governments. See generally G.A. CODDING, JR., THE UNIVERSAL POSTAL UNION 2-18 (1964) (origins of the post); P. BADURA, DAS VERWALTUNGSMONOPOL 193-209 (1963) (history and nature of the German postal monopoly).

reliability or speed arose.¹¹

With the discovery of the printing press, the rise of universities, and the expansion of commerce, the average citizen had more occasion for written correspondence.¹² As business and personal acquaintances grew, so did the demand for reliable and affordable means of transporting written messages. The postal service developed in response to that demand.¹³ Rather than cater to customers with special needs, postal services provided standard mail service to the general public. Even governmental bodies began to use the postal service, which provided reliable delivery at much more affordable prices, when there was no special need for fast or confidential delivery.¹⁴

The postal monopoly developed in response to the increasing number of written communications. As the volume of non-governmental correspondence grew, so did the concern of governments that such communications could threaten their security.¹⁵ By forcing all persons to use government-employed couriers, states hoped to control possible leaks of confidential information.¹⁶ The first postal monopolies were thus a form of censorship. The continued expansion of standard mail communications also identified the postal service as a possible revenue-producer, lending further support to the idea of a state-run monopoly.¹⁷ The concept of a state obligation to provide postal service developed even later as a justification for a postal monopoly.¹⁸

11. The Roman Empire, for example, developed an intricate messenger system to coordinate military actions. See G.A. CODDING, JR., *supra* note 10, at 2-3. More generally, governments employed couriers to inform themselves of world developments and current events. *Id.* at 3.

12. *Id.* at 5.

13. Delivery time was a consideration during the early development of postal services, but it was less of a concern than affordability. With respect to delivery time, the main concern was simply that couriers use some means of transportation other than walking. *Id.* at 10-11.

14. *Id.* at 7-18.

15. See G.A. CODDING, JR., *supra* note 10, at 6; P. BADURA, *supra* note 10, at 64; Priest, *The History of the Postal Monopoly in the United States*, 18 J. LAW & ECON. 33, 35 (1975).

16. See G.A. CODDING, JR., *supra* note 10, at 6; Priest, *supra* note 15, at 35.

17. See generally HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 93D CONG., 1ST SESS., STATUTES RESTRICTING PRIVATE CARRIAGE OF MAIL AND THEIR ADMINISTRATION 56 (Comm. Print 1973) [hereinafter cited as BOARD OF GOVERNORS REP.]. As part of the Postal Reorganization Act of 1970, the U.S. Congress directed the Board of Governors of the Postal Service to do a complete evaluation of the Private Express Statutes and to make recommendations for their modernization. As part of that study, the Board of Governors briefly reviewed the history of the statutes, *id.* at 55-62, discussed postal monopolies in other countries, *id.* at 63-68, and considered the impact of courier services on the postal service, *id.* at 83-86.

18. The concept of a state obligation to provide a postal service required two prior developments: first, that people see themselves as citizens of a nation-state and look to that state as the provider of certain rights, and second, that the service be available to a large enough percentage of the population so that people identified the service as a public func-

Once a standard postal service was in place that satisfied the demands of the general population, the need for special messengers was insufficient to spur development in the courier industry. The need for couriers did not disappear; it simply was not in great demand where communications operated on a local or regional scale. The modern business world, however, with its emphasis on international trade, has revitalized the need for international couriers.¹⁹ The importance of moving time-sensitive documents²⁰ across national borders has put a premium on courier services with the flexibility and competitive incentive to oversee transport from pick-up to delivery.²¹ The development of courier services that are independent of the standard postal service, however, has created confusion as to whether courier services fall under the scope of existing postal monopolies. The November Agreement represents an effort to define the relationship between couriers and the state postal monopoly.

B. FACTORS LEADING TO THE NOVEMBER AGREEMENT

To analyze the November Agreement, it is important to understand the parties involved and the deficiencies of the previous February Agreement.

1. *The Parties*

The primary parties to the November Agreement are the Bundespost and private international couriers.²² Datapost, the Bundespost's express courier service, operates under the Bundespost's supervision and also plays an important role in the controversy.

The West German Bundespost is a federal administrative agency

tion. This development did not occur until Sir Roland Hill's innovations in the 1840's reformed the English postal service and affected postal service worldwide. See G.A. CODDING, JR., *supra* note 10, at 7-11.

19. See Foster, *Air Express: A Service For All Seasons*, 70 A.B.A. J. 63 *passim* (1984).

20. The exact definition of "time-sensitive document" may vary from country to country. The United States Postal Service (USPS), for example, has defined an "extremely urgent exception" to its postal monopoly by stating that the Private Express Statutes, 39 U.S.C. §§ 601-606 (1980), do not apply if "delivery must be completed within 12 hours or by noon of the addressee's next business day. The suspension is available only if the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within these time limits." 39 C.F.R. § 320.6(b)(1) (1985).

21. Couriers serve a variety of businesses. Banks send checks and other monetary instruments by courier to take advantage of the most favorable interest rates. Transportation companies forward shipping documents, including bills of lading, by courier to avoid delays at customs. Engineering and construction firms manage projects in remote areas by exchanging bids, drawings, and parts between home offices and field offices via courier. E. KAUFER, *supra* note 1, at 18. Lawyers, willing to spend extra money to guarantee the fast delivery of briefs, contracts, and other documents, constitute a large section of the couriers' clientele.

22. The November Agreement consists of an exchange of letters between the Bundespost and the couriers. See *infra* notes 54-61 and accompanying text.

charged with serving the interests of the general public.²³ The Postal Law confers upon the Bundespost the exclusive right to forward written communications.²⁴ The most important function of the Bundespost is to provide standard mail service throughout West Germany.²⁵

The Bundespost has supplemented its standard mail service by the creation of Datapost. Datapost offers international express mail service to private individuals and to the government.²⁶ The 1982 statute that created Datapost²⁷ specifically provided that the Bundespost transport Datapost items "together with other postal administrations."²⁸ As a division of a governmental agency, Datapost has exclusive competence only over operations that are within national boundaries. Consequently, Datapost must rely on the cooperation of foreign postal administrations to deliver express mail across national borders.²⁹ Foreign postal services may promise to cooperate with West Germany's Datapost through international agreements;³⁰ however, reliance on international agreements has inherent structural problems: a document comes under the domain of at least two sover-

23. P. BADURA, *supra* note 10, at 199.

24. PostG § 2. The Postal Law also guarantees postal privacy, *id.* § 5, limits the liability of the Bundespost, *id.* § 11, and sets out the procedures for dispute resolutions, *id.* § 26.

25. P. BADURA, *supra* note 10, at 199. Similarly, the policy of the USPS is set out as follows:

The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.

39 U.S.C. § 101(a) (1982).

26. Datapost began service on January 1, 1983. Promotional efforts included a brochure entitled "Datapost: The International Postal Courier Service." The brochure states that Datapost "guarantees" delivery within the specified time; however, delivery time for many countries is specific only within a range of days, e.g., one to three days for delivery in the U.S., two to four days for Australia, one to two days for Great Britain and France.

27. Verordnung über den Datapostdienst Ausland [Datapost-Verordnung], 1982 BGBl I 1616 (W. Ger.).

28. *Id.*

29. *Id.*

30. See, e.g., Universal Postal Union Convention, July 5, 1974, 27 U.S.T. 345, T.I.A.S. No. 8231. The Universal Postal Union (U.P.U.), under the terms of the Universal Postal Union Convention, regulates international mail between signatories. 27 U.S.T. 345, 375. See also International Express Mail/Datapost Agreement, Dec. 15, 1978-Jan. 22, 1979, United States-West Germany, 30 U.S.T. 3789, T.I.A.S. No. 9426. The International Express Mail/Datapost Agreement predates the 1982 Datapost-Verordnung that created Datapost. The Datapost-Verordnung, however, superseded another regulation creating a foreign express mail delivery service in October of 1978. Datapost-Verordnung § 13(2). Presumably, since the United States and West Germany have not modified their International Express Mail/Datapost Agreement, the 1982 Datapost replaced the earlier Datapost for purposes of that Agreement.

eign states, and administrative details create delays.³¹

By contrast to Datapost, private international couriers operate independently of the government. Couriers, able to focus on the demand for fast, reliable delivery of time-sensitive documents,³² provide delivery across international borders while maintaining exclusive control of the document.³³ The typical private international courier, unlike Datapost, establishes a network of centers throughout the world to facilitate the direct transfer of a document from one location to another.³⁴ Although more than one person may handle the document during transport, the document always remains within the control of a single courier company.³⁵ If a document is lost, the private courier can trace it wholly by reference to its internal records;³⁶ in the event of irrecoverable loss, the courier company is directly liable to the sender.³⁷ Private international couriers offer pick-up and delivery times tailored to business needs,³⁸ and the couriers guarantee delivery

31. The Universal Postal Union Convention distinguishes between the country of origin and the country of destination of a posted document. *E.g.*, Universal Postal Union Convention, *supra* note 30, art. 5 (defining ownership of postal items during course of transit); *id.*, art. 23 (country of destination may impose storage charge); *id.*, art. 30 (specifying conditions under which sender may withdraw an item from the post; conditions depend upon whether item is in country of origin or country of destination). Further, the Convention specifies at which points each nation's law governs. With respect to express items, for example, article 29 of the Convention provides that if the administration of the country of destination offers the service, a letter may be delivered "by special messenger as soon as possible after arrival at the delivery office." *Id.*, art. 29(1). Special demands are governed by the country of destination. *Id.*, art. 29(3). In a provision that clearly demonstrates a difference between the postal service and private international couriers, the postal administration in the country of destination is only required to make one attempt at express delivery. If that attempt fails, the country of destination may treat the item as ordinary mail. *Id.*, art. 29(5).

The Universal Postal Union Convention also has liability provisions which differ in important respects from those of a private international courier. The postal administration is only liable for the loss of registered items, *id.*, art. 44, and may even be entitled to repayment from the sender or addressee if the item is later found and delivered, *id.*, art. 50. These concepts are contrary to the principles of liability guaranteed by private international couriers who pay for documents that arrive late as well as for lost documents. *See, e.g.*, Federal Express Service Guide 194, 201 (Oct. 1984).

32. *See Foster, supra* note 19, *passim*.

33. *See, e.g.*, Federal Express Service Guide, *supra* note 31, at 1 ("No multiple carriers or interline shipments with Federal Express to any of our direct service points. Our own couriers, vans, aircraft and hub means your package never leaves our hands until it is delivered.").

34. *See, e.g., id.* at 191-205 (international service conditions).

35. *Id.* at 165.

36. Tracing procedures for postal service items, on the other hand, involve cooperation by at least two postal administrations. *See supra* note 31.

37. For most couriers, liability is limited by terms made known to the consumer prior to carriage. Federal Express, for example, limits its liability for any shipment from the United States to Europe to \$100.00, with a maximum of \$500.00 for items of extraordinary value. Federal Express Service Guide, *supra* note 31, at 197.

38. *Id.* at 200-01. Private couriers often provide Saturday service. Some postal services, on the other hand, have terminated Saturday service or otherwise reduced the frequency of pick-up and delivery when cost-saving measures have been necessary. *See, e.g.*,

within a specified time.³⁹ The price for this specialized service is a high fee which only an actual time-sensitive document can justify.⁴⁰

By early 1984, private international couriers and Datapost were both operating in West Germany, despite the existence of West Germany's postal monopoly.⁴¹ In February of 1984, representatives of the couriers and the Bundespost met to discuss the relationship between the couriers and the state postal monopoly.

2. *The February Agreement*

The February Agreement comprised an exchange of letters between the couriers and the Bundespost.⁴² The Bundespost's letter to the couriers stated the government's position: the postal monopoly was in effect on all routes where the service provided by Datapost was "as fast and as reliable" as courier services.⁴³ The letter also outlined measures designed to make Datapost more efficient and, thus, competitive with the courier industry.⁴⁴ The effect of the February Agreement was to allow couriers to continue operating only on routes where

E. KAUFER, *supra* note 1, at 29 (describing the West German Bundespost's curtailment of Saturday service and less frequent pick-ups from letter boxes).

39. Federal Express Service Guide, *supra* note 31, at 208-13. Even if a private courier relies on commercial flights, the courier can incorporate the estimated times into its guarantee. There is, however, no need for couriers to allow for possible inefficiencies in another nation's postal administration.

40. For a sample rate schedule for a private international courier, see *id.* at 166, 171, 175. The rate schedule for Datapost is published in the Auslandspostgebührenordnung, 1981 BGBl I 1070 (W. Ger.) (schedule for outgoing foreign mail). Fees for International Express Mail, the USPS equivalent of Datapost, are published in the International Mail Manual, which is incorporated by reference in the Federal Register. See 39 C.F.R. § 10.1 (1984).

41. See *supra* note 26. Datapost entered a market that was already well established. See E. KAUFER, *supra* note 1, at 5.

42. Letter from the Bundesminister für das Post- und Fernmeldewesen to BIK Legal Counsel (Feb. 21, 1984) [hereinafter cited as Bundespost Letter of Feb. 21, 1984]. BIK denotes the National Association of Courier Services. See *supra* note 4.

43. The government described its position as follows:

The German Postal Service will not enforce the postal monopoly against private couriers with respect to international messages, if, within certain limits, the Bundespost cannot provide service that is as fast and as reliable. A fast and reliable postal service is, however, offered in the Datapost service of the Bundespost.

Bundespost Letter of Feb. 21, 1984.

44. Three specific measures were cited:

[(1)] The Bundespost will accept Datapost communications, even when the sender ships irregularly according to need, without application or permit procedures.

[(2)] Regular pick-ups of Datapost communications can be arranged for a fixed price of 14 DM, regardless of the distance between the location of the sender and the designated drop-off spot within the city limits.

[(3)] Datapost International operates at present with 31 countries of the world, and will shortly operate with 33 when Malaysia and Cyprus are added. . . .

Id.

Datapost could not offer comparable service.⁴⁵ The Agreement, however, gave the couriers formal notice that the monopoly would be enforced and courier service would be eliminated on routes where Datapost was able to compete with the couriers in terms of speed and reliability.

The February Agreement had several flaws. First, the non-binding nature of the Agreement⁴⁶ left the future status of the couriers unsettled; the Agreement neither officially exempted couriers from the postal monopoly nor officially prohibited their operation. West Germany's refusal to take a firm stance on private couriers was also at odds with the many countries that had committed themselves to a definite position.⁴⁷ Second, this uncertainty created immediate operational disadvantages for the couriers; in particular, the uncertainty made it difficult for the couriers to accurately represent the status of Datapost in their advertising.⁴⁸ Furthermore, the possibility that Datapost might force the couriers out of business in the future deterred the couriers from investing money, time, and creative energy to improve their efficiency.

Finally, the timing of the Bundespost's entry into the international courier market violated the fundamental principles of a market economy. If the Bundespost maintained that the operation of private international couriers violated the postal monopoly, then the Bundespost should have objected to the couriers at the first signs of activity in the private sector. By delaying its entry into the interna-

45. The February Agreement did not expressly provide an exemption as authorized in the Postal Law. See PostG § 2(4). The conclusion that the couriers were exempt from the monopoly where Datapost was not as fast and reliable was, however, implied in the meaning of the Agreement.

46. The Bundespost Letter of Feb. 21, 1984, *supra* note 42, was merely an opinion letter of the Bundesminister for Post- and Telecommunications. The letter would be equivalent to similar non-binding opinion letters that agencies in the U.S. issue: they are evidence of the law, not substantive law itself. Similarly, the November Agreement is also non-binding. See *infra* notes 93-97 and accompanying text.

47. Countries have taken various approaches to the courier industry. The U.S. has expressly exempted private couriers from its Private Express Statutes via the "extremely urgent exception." See *supra* note 20. Canada and the United Kingdom both exempt private couriers upon payment of a set fee that exceeds normal postal rates. See Postal Privilege Suspension Order § 2(2), 1981 STAT. INST. 1483 (U.K.); 1981 CAN. STAT. O. & REG. 82-35, reprinted in 116 Can. Gaz. 119, 165 (Jan. 13, 1982) (Can.). The November Agreement between the West German Bundespost and the couriers left France as the only EEC member that expressly forbids private courier operations, although France has made narrow exceptions for restricted service. See *Frankfurter Allgemeine Zeitung* [FAZ], Dec. 20, 1984, at 14, col. 1.

48. The concluding paragraph of the February Agreement warned that the couriers were required to state the Bundespost's legal position accurately in their advertising. Bundespost Letter of Feb. 21, 1984, *supra* note 42. Since the Agreement would have gradually expanded the monopoly's scope as Datapost service improved, see *supra* text accompanying note 7, the Agreement, in effect, required couriers to speculate as to Datapost's speed and reliability and to present that status accurately in advertising.

tional courier business, however, the Bundespost severely undercut the private couriers' potential to recover the developmental costs incurred at the initial, inefficient stages of operation.⁴⁹

It is a perversion of competitive market principles for a public entity to sit back and watch as private industry makes innovations in the free market and invests huge amounts of money in development, then to enter the market itself, simultaneously claiming the right to a monopoly.⁵⁰ Entry by public agencies in this fashion undermines a free market economy by removing essential incentives: a private competitor's goals of developing a market and increasing market share for profit.⁵¹ Furthermore, a market economy generally tolerates state-run monopolies only when the private sector fails at a particular venture or when the private sector is very inefficient at providing a particular service.⁵² The private international courier industry was neither failing nor inefficient when the Bundespost initiated Datapost service.

These weaknesses in the February Agreement were perhaps anticipated: the Agreement itself provided for the parties to meet in the near future to establish a more permanent solution.⁵³ Nine months later, the parties reformulated their positions in the November Agreement.

C. THE NOVEMBER AGREEMENT

Like the February Agreement, the November Agreement consists of letters exchanged between the Bundespost and the couriers.⁵⁴

49. See *supra* notes 26, 41.

50. See generally Breit & Breuel, *Lockerung des Postmonopols?*, 31 WIRTSCHAFT UND WETTBEWERB 93, 97 (1981) (a debate on relaxing the postal monopoly restrictions).

51. For a discussion on business incentives in the international setting, see S. ROBOCK, K. SIMMONDS & J. ZWICK, *INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES* 399-426 (1977).

52. Inefficiency in the private sector characterizes a "natural monopoly." A natural monopoly is a monopoly that exhibits "an inherent tendency to decreasing unit costs over the entire extent of the market." 2 A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 119 (1971). In other words, industries which require large investments of capital in order to operate at a minimum level produce more efficiently if operated and regulated by a single entity. The electric utility industry is an example of this concept. The courier industry, however, is labor-intensive rather than capital-intensive; no large investment in plant or equipment is necessary to begin service. The telecommunications industry has characteristics of both: it does not require the huge generating plants that are associated with the electric utility industry, but it does require some investment in equipment. The concept of a natural monopoly, then, may offer a policy reason for adopting a broader monopoly concept with respect to telecommunications while maintaining a narrow interpretation for the postal service vis-à-vis the couriers. See *infra* notes 154-58 and accompanying text.

53. See *infra* note 97.

54. The couriers' letter to the Bundespost states, in relevant part:

The participants of the meeting [between the couriers and Bundespost] were all of the understanding that the operation of international couriers does not fall within the realm of letter delivery in the normal mass distributions of the Bundespost, but

Although the letters are not legally binding, they represent significant changes from the February Agreement and are more permanent in character.⁵⁵

The November Agreement establishes the new status quo with four substantial modifications of the parties' relationships. First, the Bundespost acknowledges that "true" private international couriers, as defined by the Agreement, are not subject to the postal monopoly.⁵⁶ In other words, the November Agreement limits the scope of the Bundespost's monopoly to standard mail service. This determination also recognizes a clear distinction between courier services and the Bundespost's mail service. Second, the Agreement unambiguously places Datapost and private couriers in a competitive relationship, without regard to Datapost's actual competitiveness.⁵⁷ The

rather is specialized in especially fast and reliable door-to-door delivery. In contrast to the traditional mass distribution of postal items, courier messages are transported across national boundaries under the supervision of one organization and remain in the control of this organization. The fact that the [courier] organization uses one or more couriers working as a unit under one management contract is of no consequence to courier status. The exclusive administrative control of this organization over the courier message exists throughout the entire transportation route and allows the courier service—on the sender's demand—to route or re-route a message accordingly. Control of the message is further secured through the person of the accompanying courier, who will carry proof of every message in a bill-of-lading type document. Moreover, the exclusive control over the message is required as a matter of civil law (liability law).

[The couriers] assume with [the Bundespost] that international couriers who transport communications in the manner described above, regardless of the contents of those communications, are not subject to the postal monopoly set out in section 2 of the Postal Law. It was also agreed that Datapost and the international couriers stand in a competitive relationship to one another and that a market-economy competition with concern for the needs of the economy and consumer is desirable.

[The couriers] gladly agree to [the Bundespost's] suggestion that [the parties] meet again in two to three years to discuss the progress made to that point with this agreement. Should there be unexpected difficulty in limiting the scope of this agreement which results in harm to the mass distributions of the Bundespost, the development of additional criteria to the present agreement will be required.

Letter of BIK to Bundesminister für das Post- und Fernmeldewesen (Nov. 30, 1984) [hereinafter cited as *Couriers' Letter of Nov. 30, 1984*]. The Bundespost's reply to the Couriers' Letter reiterated and emphasized the critical points as follows:

[T]he agreement applies only to international correspondence. . . . The Bundespost must enforce its postal monopoly whenever the limited criteria for a true courier service, as worked out . . . , are not met. The criteria are: transportation of messages from door-to-door by couriers who continuously accompany the separately traceable messages and, where required, possess individual authorization for the given route and for the means of transportation.

Bundespost Letter of Dec. 18, 1984.

55. See *infra* notes 93-97 and accompanying text.

56. See *supra* note 54. The exemption appears to be under section 2 of the Postal Law. See *supra* note 2.

57. This is a significant departure from the February Agreement, which allowed private international couriers to compete with Datapost only where Datapost was "as fast and reliable." See *supra* note 43 and accompanying text.

Bundespost recognizes that "market-economy competition with a concern for the needs of the economy and consumer is desirable."⁵⁸ Third, the Agreement provides mechanisms to ensure that the Bundespost and private international courier services remain distinct.⁵⁹ Couriers are required to carry proof that each message is of the type excluded from the Bundespost's monopoly.⁶⁰ This provision ensures the Bundespost that couriers will not compete with standard mail service and thus protects the scope of the national postal monopoly.⁶¹ Finally, the November Agreement suggests that the parties meet whenever difficulties arise under the Agreement, or, as a matter of course, in two to three years. This provision reflects a cooperative attitude as well as both parties' desire for a stable relationship.

II. LEGAL PROVISIONS AFFECTING THE SCOPE OF THE POSTAL MONOPOLY

The November Agreement establishes a viable relationship between the Bundespost, Datapost, and the couriers. The newly defined status quo must be measured against West German law and relevant provisions of the Treaty of Rome, which governs West Germany as a member of the European Economic Community.

A. WEST GERMAN LAW

The operation of the postal monopoly in West Germany derives from three separate sources of law: the Constitution, the Postal Law, and the Postal Administrative Law. Although these sources neither separately nor as a unit clearly define the scope of the postal monopoly, they do provide guidelines for analysis.

The West German Constitution is the primary source of authority for the federal government's monopoly. Article 73(7) of the Constitution reserves to the government the exclusive power to legislate in

58. Couriers' Letter of Nov. 30, 1984, *supra* note 54.

59. The Agreement establishes criteria for ensuring that private international couriers perform only true courier services. The criteria are: "[1] transportation of messages from door-to-door by couriers who continuously accompany the separately traceable messages and . . . [2] where required, possess individual authorization for the given route and for the means of transportation." Bundespost Letter of Dec. 18, 1984, *supra* note 54.

60. "Control of the message is further secured through the person of the accompanying courier, who will carry proof of every message in a bill-of-lading type document." Couriers' Letter of Nov. 30, 1984, *supra* note 54.

61. This result depends on the Bundespost's ability to restrict the private couriers to true courier service through the agreed-upon criteria. *See supra* note 59. Other systems that depend on compliance with similar definitions have become problematic. Compare the USPS' "extremely urgent" exception, *supra* note 20 (the content-based exception has proven difficult to enforce, with the result that many business entities, merely for the sake of convenience, send items by courier that do not satisfy the "extremely urgent" definition).

matters of postal and telecommunications services.⁶² The Constitution also establishes the Bundespost as an agency of the federal administration with its own administrative substructure.⁶³

The second source relevant to the scope of the monopoly is section 2 of the Postal Law. This provision grants to the Bundespost the exclusive power to establish and operate facilities for the commercial forwarding of shipments containing written correspondence or other communications from person to person.⁶⁴ Section 2, however, provides no additional information on the scope of the monopoly; therefore, defining the scope becomes problematic as the Bundespost improves old services and introduces new ones.

In addition to the Constitution and the Postal Law, the Postal Administrative Law⁶⁵ governs the internal operations of the Bundespost. Section 15 of this statute requires the Bundespost to operate on a balanced budget.⁶⁶ This obligation requires the Bundespost to cross-subsidize non-profitable routes with revenues from profitable routes.⁶⁷ The requirement that the Bundespost operate on a balanced budget supports the corollary right to protect revenue-producing routes through a monopoly.⁶⁸

B. THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY

In 1958, the Treaty of Rome established the European Economic Community.⁶⁹ The Treaty set out the legal framework necessary to promote economic growth and harmony among the Member States of

62. GRUNDGESETZ [GG] art. 73(7) (W. Ger.).

63. "[T]he federal postal service . . . shall be conducted as [a] matter of direct federal administration with [its] own administrative substructure" GG art. 87. It is the particular function of an administrative monopoly (such as the postal monopoly) to further a specific administrative purpose. P. BADURA, *supra* note 10, at 90. The special administrative purpose of the Bundespost is to organize the unified and fair distribution of written messages throughout West Germany. *Id.* at 199.

64. PostG § 2.

65. Postverwaltungsgesetz [PVerwG], 1953 BGBl I 676 (W. Ger.) (Postal Administrative Law).

66. "The German Bundespost must establish and enforce its budget in such a way that it can defray the costs necessary to fulfill its tasks and duties from the Bundespost's own income. Subsidies from the federal treasury will not be allowed." *Id.* § 15(1).

67. See Leithäuser, *Das Leistungsprinzip in der Verwaltung und Leistungssteigerung bei der DBP*, 25 JAHRBUCH DES POSTWESENS 137 (1975), *summary in English* at 394.

68. See Altmannspenger, *Ursprung und Entwicklung der staatlichen Alleinrechte auf dem Gebiet des Postwesens*, 19 JAHRBUCH DES POSTWESENS 236 (1969) (Origin and Development of Exclusive State Control over the Postal Service). Altmannspenger recognizes that a monopoly is necessary to ensure to the Bundespost sufficient means to carry out its functions. Altmannspenger suggests, however, that in light of the Bundespost's public service function, the Bundespost's objective should not necessarily be to make a large profit. *Id.* at 237-38.

69. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as Treaty of Rome]. Article 2 establishes the general objectives of the Community. See *infra* text accompanying note 77.

the newly formed Community.⁷⁰ To attain these objectives, the Treaty empowered the Community organs with the authority to bind Member States through a variety of legal measures, most often directives or regulations.⁷¹ The law of the EEC therefore not only binds Member States, but supersedes inconsistent provisions of national law.⁷²

As a Member State of the EEC, West Germany is bound by the Treaty as well as by directives and regulations issued pursuant to the Treaty. As part of the federal government of West Germany, the Bundespost is also subject to all binding EEC measures and must comport with the law and objectives of the EEC.⁷³

The European Commission is the organ of the Community responsible for ensuring that Member States comply with specific provisions and policies of the Treaty of Rome.⁷⁴ To fulfill its watch-dog function, the Treaty of Rome empowers the Commission to conduct investigations.⁷⁵ If the Commission determines that there has been a

70. "The task entrusted to the Community shall be carried out by . . . an Assembly, a Council, a Commission, [and] a Court of Justice. Each institution shall act within the powers conferred upon it by the Treaty." Treaty of Rome, art. 4.

71. In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations, or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Id., art. 189. See also P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 183-89 (1975).

72. See generally A. PARRY & J. DINNAGE, E.E.C. LAW 87-92 (1981). See, e.g., *N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Tariefcommissie*, 1963 C.J. Comm. E. Rec. 7, reported in *English*, 2 Common Mkt. L.R. 105, 129 (Case 26/62) (the Community creates a new legal order imposing obligations on individuals as well as rights to be protected in national courts); *Wilhelm v. Bundeskartellamt*, 1969 C.J. Comm. E. Rec. 1, reported in *English*, 8 Common Mkt. L.R. 100, 119 (Case 14/68) (conflicts between the Community rule and national rules on competition should be resolved by applying the principle of primacy to the Community rule); *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E. Comm. Ct. J. Rep. 629, 643 (Case 106/77) (principle of precedence of Community law automatically renders inapplicable any conflicting provision of national law and precludes adoption of any new national legislation inconsistent with Community provisions).

73. This is evidenced by the Commission's investigation into the Bundespost's postal monopoly. See *infra* notes 111-15 and accompanying text.

74. See *supra* note 71.

75. Treaty of Rome, art. 213. The article also provides that the European Council may establish limits and conditions on information gathering. In addition to formal inquiry under article 213, matters may also come to the Commission's attention "through complaints from Member States, by way of written question from the European Parliament, and by way of complaints of individuals." A. PARRY & J. DINNAGE, *supra* note 72, at 19 (footnotes omitted). It may also be assumed that the members of the Commission take notice of potential violations that they themselves observe.

breach of the Treaty,

[t]he usual procedure by which the Commission takes action against a Member State is contained in Article 169, providing for the issue of a reasoned opinion on the matter; in the event of non-compliance, the matter can be brought before the Court of Justice. Often, however, threat of proceedings will have the desired effect, or else the action may be dropped at the opinion stage or even later.⁷⁶

Four provisions of the Treaty of Rome pertain to the scope of monopolies and, therefore, to the November Agreement.

Articles 2 and 3 of the Treaty of Rome establish the Community's objectives and provide means to achieve those objectives. Member States and their agencies, such as the Bundespost, must not adopt provisions incompatible with articles 2 and 3. Article 2 provides in full:

The Community shall have as its task, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.⁷⁷

Therefore, under article 2, the status quo achieved under the November Agreement must be consistent with other Member States' laws and should allow opportunity for economic growth.

Article 3 establishes the means to achieve the objectives of article 2. Article 3 provides that "[f]or the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty . . . the approximation of the laws of Member States to the extent required for the proper functioning of the Common Market"⁷⁸

76. A. PARRY & J. DINNAGE, *supra* note 72, at 19 (footnote omitted). Article 169 reads, in full:

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Treaty of Rome, art. 169.

77. *Id.*, art. 2.

78. *Id.*, art. 3(h). The Court of Justice of the European Community (E.C.J.) has stated that the basic provisions of the Treaty of Rome apply to the "whole complex of economic activity." *Commission of the European Communities v. French Republic*, 1974 E. Comm. Ct. J. Rep. 359, 14 Comm. Mkt. L.R. 216, 228 (para. 21) (Case 167/73) (French law that required certain percentage of crew on French vessels to be French citizens was found to be within the "whole sphere of economic activity;" the Court of Justice held that failure to rescind the law violated the mandate to approximate).

The Treaty of Rome does not purport to regulate the economic activity of national postal services as long as the effects of such activity are confined within the nation's borders. The source of the European Commission's concern with respect to international couriers, however, was that a restriction on the growth of courier companies would have an adverse effect on the growth and integration of the European Community. See 18 BULL. E.C. 21 (pt. 1 1985).

The term "approximation" does not require the surrender of national functions to the European Community. Rather, the term "refer[s] to activities designed to make national rules or policies more consistent with each other, and to some extent, more consistent with the general purposes of the Treaty. . . ." ⁷⁹ The Treaty does not intrude on activities wholly within a Member State's borders; it does, however, impose an obligation on Member States to strive for a certain degree of uniformity with respect to activities which have effects throughout the Community.⁸⁰ Commentators have specifically pointed to postal and telecommunications services as a field appropriately subject to approximation requirements.⁸¹

Article 86 is the third provision of the Treaty of Rome relevant to the scope of the West German postal monopoly.⁸² As part of the Community's competition policy established in articles 84 through 94,⁸³ article 86 is of particular significance with respect to monopolies: it forbids the abuse of a dominant position within the European Community.⁸⁴ An entity violates article 86 if (1) it is an undertaking; (2) it abuses a dominant position; and (3) the abuse adversely affects trade between Member States.⁸⁵

The fourth provision of the Treaty of Rome that bears on the November Agreement and the Bundespost's monopoly is article 90, also part of the Community's competition policy.⁸⁶ Article 90 specifi-

79. 1 H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 18 (1984). As the commentary points out, problems arising from interpretation of article 2 have been more political and practical than definitional and legal. "[The problems of interpretation] are related to the reluctance of many Member States to adjust their economic policies . . . in certain instances to the needs of the Member States as a whole." *Id.* at 18.

80. Treaty of Rome, art. 3(h).

81. 1 COMM. MKT. REP. (CCH) ¶ 3302.35 (1985). Although the couriers never conceded that their services were within the Bundespost's competence, couriers clearly serve a communicative function that would advance integration of the European Community.

82. Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Treaty of Rome, art. 86.

83. See generally A. PARRY & J. DINNAGE, *supra* note 72, at 312-42.

84. See *supra* note 82.

85. See *id.*

86. 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor

cally extends the general principles of the Treaty of Rome to "public undertakings"⁸⁷ and "undertaking[s] to which Member States grant special or exclusive rights."⁸⁸ Article 90 furthers a policy that prevents a Member State from achieving advantages through its agencies that the Treaty otherwise forbids.⁸⁹

If an entity is a public undertaking, or an undertaking with special or exclusive rights, article 90(1) prohibits the enactment or maintenance by a Member State of any measures that are inconsistent with the Treaty of Rome.⁹⁰ The inconsistency requirement implies that article 90 does not prohibit government monopolies per se; "[t]he EEC Treaty prohibits the Member States neither from denationalizing public enterprises nor from nationalizing private enterprise."⁹¹ Monopolies are tolerated, however, only to the extent that they do not interfere with the development of trade.⁹²

The scope of the postal monopoly is therefore limited by West German law and articles 2, 3, 86, and 90 of the Treaty of Rome. This Note will analyze the November Agreement in light of those limitations.

III. ANALYSIS

A. THE NON-BINDING CHARACTER OF THE NOVEMBER AGREEMENT

The November Agreement does not technically create binding legal obligations between any of the parties. Although the Bundespost, as a federal administrative agency, possesses derivative law-making competence,⁹³ new law cannot be created without adher-

maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Articles 7 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interest of the Community.

Treaty of Rome, art. 90(1)-(2). *See generally* Schindler, *Public Enterprises and the E.E.C. Treaty*, 7 COMM. MKT. L. REV. 57 (1970).

87. *See supra* note 86.

88. *Id.*

89. *See* 3 H. SMIT & P. HERZOG, *supra* note 79, at 344 (Court of Justice will construe article 90 broadly to prevent Member States from achieving what the Treaty prohibits).

90. *See supra* note 86.

91. Schindler, *supra* note 86, at 58.

92. Treaty of Rome, art. 90(2).

93. *See generally* W. FRIEDRICH, *supra* note 8, at 34-37 (sources of German law); G. KÖBLER, *supra* note 9, at 252-61 (public law).

ence to minimum formalities.⁹⁴ The mere exchange of letters, like the exchanges that resulted in the February and November Agreements, fails to satisfy the formal requirements of new legislation and thus has no binding force.

The November Agreement, nevertheless, has the practical effect of providing certainty to the couriers. The February Agreement had created uncertainty by suggesting that an improved Datapost service would curtail and gradually eliminate the private couriers' right to operate.⁹⁵ The November Agreement, by contrast, defines a "true courier" and guarantees such a courier's right to operate.⁹⁶ The non-binding November Agreement thus clarifies the relationship of the couriers to the Bundespost and Datapost.

Despite the non-binding character of the November Agreement, at least two factors suggest the Agreement will prove to be durable. First, the Bundespost and the couriers reached the February Agreement in contemplation of further negotiations.⁹⁷ The November Agreement is therefore a direct outgrowth of expectations recognized during the negotiation of the February Agreement. Second, the parties have had sufficient time to investigate and address all the legal issues. In addition to the unambiguous language of the November Agreement, these factors suggest that the Agreement is more than a short-term solution.

B. THE EFFECT OF THE NOVEMBER AGREEMENT AND WEST GERMAN LAW

The status quo achieved by the November Agreement is consistent with West German constitutional and legislative provisions. Article 73(7) of the West German Constitution grants the federal government exclusive power to provide both postal and telecommunications services.⁹⁸ Section 2 of the Postal Law shapes this broad grant of power by defining terms and authorizing the Bundesminister for Postal and Telecommunications to grant exemptions from the postal

94. W. FRIEDRICH, *supra* note 8, at 34 (formality is required in order to impress the force of law on the conscience of society); *see also* GG art. 80 (issuance of ordinances having the force of law).

95. *See supra* notes 42-43 and accompanying text (the Bundespost will not enforce the postal monopoly where it cannot provide service that is as fast and as reliable as the couriers' service).

96. *See supra* note 54.

97. The parties concluded the February Agreement with three conditions: (1) the Bundespost and the couriers would continue to negotiate in good faith to reach a workable solution; (2) neither side would contemplate a "surprise" legal attack in the courts as long as negotiations continued; and (3) if either side did contemplate legal action, it would provide reasonable notice to the other side. Interview with Johann-Andreas Rossbach, Rossbach & Kirchner (Frankfurt, West Germany), June 4, 1984.

98. GG art. 73(7) (W. Ger.).

monopoly.⁹⁹ Thus, the exemption for private international couriers provided in the November Agreement is a proper exercise of the Bundesminister's authority.

Analysis of the November Agreement under the postal administrative regulations is more complex. Section 15 of the Postal Administrative Law requires the Bundespost to operate on a balanced budget.¹⁰⁰ The Bundespost, however, also has an obligation to provide all citizens with standard mail service.¹⁰¹ These two obligations create a conflict for the Bundespost, which cannot operate all routes at a profit.¹⁰² Generally, the Bundespost must cross-subsidize the cost of delivery to small-scale users and rural dwellers with profits from routes having lower transportation costs and higher volume.¹⁰³ The couriers, by contrast, have no obligation to provide service to all citizens and may therefore confine their operations to profitable, high-volume routes.

The Bundespost has argued that its obligation to provide all citizens with mail service, along with the balanced-budget requirement, leaves the Bundespost especially susceptible to "cream-skimming" by private international couriers. Cream-skimming would rob the postal service of business on its most lucrative routes, forcing the Bundespost to continue rural deliveries without the economic means to do so.¹⁰⁴

If the Bundespost and the couriers offered identical services, the cream-skimming argument might be persuasive. The November Agreement avoids this argument, however, by distinguishing private international courier service from standard mail service.¹⁰⁵ As one study has concluded, postal services are most susceptible to cream-skimming on local routes that have a high volume of business transactions.¹⁰⁶ Local ventures, the study found, would be easy to launch (little sorting required; limited delivery area) and would have a high profit potential.¹⁰⁷

99. See *supra* note 2.

100. See *supra* note 66.

101. See *supra* notes 18, 63.

102. See Leithäuser, *supra* note 67.

103. *Id.*

104. See Altmannspurger, *supra* note 68. Cream-skimming was also a problem in the United States. See generally BOARD OF GOVERNORS REP., *supra* note 17.

105. See *supra* note 54 (the Agreement specifies that "the operation of international couriers does not fall within the realm of letter delivery in the normal mass distribution of the Bundespost . . ." (emphasis added)). See also *supra* note 60 (couriers required to carry proof documenting their courier status).

106. BOARD OF GOVERNORS REP., *supra* note 17, at 119. This study did not cite couriers as potential cream-skimmers, although it acknowledged couriers as a source of competition. *Id.* at 83-86.

107. *Id.* at 127-28.

Private international couriers do not possess the characteristics that would make a local venture a potential cream-skimmer. Rather than simplified delivery systems, couriers must organize intricate networks of pick-up and delivery points. Coordination between messengers and management must be precise. Private international couriers must arrange overseas flight schedules and plan for possible delays.¹⁰⁸ Finally, instead of offering their customers savings, private international couriers charge substantially higher fees for their service because it guarantees greater speed and reliability.¹⁰⁹

Because the November Agreement exempts only private international couriers from the postal monopoly and because these couriers do not threaten profitable standard mail routes,¹¹⁰ the November Agreement produces a status quo that is consistent with the Bundespost's balanced-budget requirement.

C. THE EFFECT OF THE NOVEMBER AGREEMENT AND EEC LAW

The status quo established under the November Agreement takes on added significance in light of concerns expressed by the European

108. Especially in the early stages of operation, private couriers often rely on commercial airlines. The more profitable companies may eventually purchase their own aircraft to increase efficiency. See, e.g., Federal Express Service Guide, *supra* note 31.

109. See *supra* note 40 and accompanying text.

110. In addition to the suggestion that private international couriers do not represent a cream-skimming threat, there is also no evidence that couriers have created financial hardship for the Bundespost and Datapost. The Statistical Abstract for West Germany does not include specific figures for Datapost. Figures for the Bundespost as a whole over the past eight years, however, show that although total profits have decreased, returns from postal operations have steadily increased. STATISTISCHES BUNDESAMT, STATISTISCHES JAHRBUCH FÜR 1984 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 310 (1985) [hereinafter cited as STATISTISCHES JAHRBUCH] (and previous volumes). In particular, the number of registered mail items and small packages (those items which, rather than postal letters, a private courier would carry), has remained fairly stable; registered mail items have shown a slight increase. *Id.* at 527. Thus, although the Bundespost has seen a decrease in profits, the increase in volume of items handled suggests that the couriers may not have skimmed the cream off the Bundespost's most lucrative business.

Some countries facing actual lost revenue impose a fee on couriers as a compromise solution to the problem. See *supra* note 47. While such a solution is realistically possible, it is theoretically inconsistent for the postal service, which can operate only at the domestic level (or in cooperation with foreign postal services), to impose a lost revenue fee on international couriers who, the postal service claims, have no authority to operate within the country. The postal service, in effect, is taking a lost revenue fee from an operation that it claims is illegal. Moreover, the lost revenue fee solution begs the more fundamental question of why private-sector providers of an *international* service should be required to subsidize a *domestic* service. It is perhaps helpful to analogize to the health care industry, where those who wish to receive more personalized and thorough care may choose to enter a private hospital and incur considerably higher rates. Such hospitals are not asked to subsidize government-supported hospitals that provide less specialized service, even though private hospitals clearly take away business that would otherwise go to the general hospitals. Likewise, private international couriers provide a more specialized service for a higher fee, and it is not clear why the couriers should be required to share that profit as a subsidy to a government service.

Commission that the Bundespost's prior position conflicted with EEC law.¹¹¹ The Commission became involved in the controversy between the Bundespost and the couriers in October of 1984, when it requested that the Bundespost answer a number of written questions.¹¹² At the time of the Commission's request, the parties were preparing to meet on November 27, 1984. Apparently satisfied with the November Agreement, the Commission closed its investigation without taking action before the European Court of Justice.¹¹³

Although the Commission's investigation did not result in a binding regulation, directive, or decision, the Commission did issue an opinion¹¹⁴ establishing its position: "[The Commission] regards the Member States' postal and telecommunications authorities as commercial undertakings, since they supply goods and services for payment, and . . . any extension by one or more of these undertakings of their dominant positions may constitute an abuse under Article 86 of the EEC Treaty."¹¹⁵

111. The Commission was concerned that the Bundespost might expand its postal monopoly to eliminate private courier service in West Germany. The Commission's official report states that "[t]his [elimination] would have been particularly regrettable as the courier companies are extremely important for the growth and integration of the European economy." 18 BULL. E.C. 21 (pt. 1 1985) (official summary of Commission's activity). The report continues: "An extension of the Bundespost's postal monopoly would also have paralysed the extensive network of courier services that has grown up with other Member States, although the postal authorities in these countries do not claim a monopoly for courier services." *Id.*

112. Telephone interview with Library Staff Member, United States Information Service for the European Economic Communities (Oct. 25, 1985).

113. 18 BULL. E.C. 21 (pt. 1 1985). The report summarizes the effect of the investigation:

After the Commission expressed concern about [expansion of the Bundespost's monopoly to exclude the couriers], on the basis of Article 86 of the EEC Treaty, the Bundespost agreed to accept competition from private courier companies in the Federal Republic. It has recognized that courier services differ from the services provided by a postal authority in that consignments carried by a courier company are under constant supervision throughout the journey from the consignor to the consignee, are at all times individually identifiable and can be diverted *en route* to another destination or consignee. National postal authorities cannot provide such a service since they have to hand over consignments at the border to another postal authority, so that they cannot guarantee constant supervision, identifiability and possibility of diversion of the consignment. The Bundespost has also given assurances that it does not intend to penetrate the market by charging below cost for its own express delivery services.

The Commission has therefore been able to close its investigations into this case.

The Commission could have taken action under article 169 of the Treaty of Rome. *See supra* notes 74-76 and accompanying text.

114. As an opinion, the Commission's statement has no legal force. *See supra* note 71 (recommendations and opinions shall have no binding force) (quoting article 189 of the Treaty of Rome).

115. 18 BULL. E.C. 21 (pt. 1 1985). The opinion is significant for analysis of the November Agreement under articles 86 and 90 of the Treaty of Rome. *See infra* notes 119-46 and accompanying text.

Before analyzing the Commission's opinion, it is important to note that the status quo established under the November Agreement is consistent with the objectives of the Treaty of Rome set out in article 2. The objective of harmonious development of economic activities between Member States is, in fact, furthered by the Agreement: private international couriers are allowed to develop in West Germany as they have developed in other Common Market countries—without government interference.¹¹⁶ Consistent treatment of couriers within the EEC will help to establish better communication throughout the EEC. In particular, consistent treatment of couriers will ensure that businesses and private individuals in West Germany have access to the same fast and reliable communication services that are available in other EEC countries.¹¹⁷ Compliance with article 2 also satisfies article 3, because article 3 simply establishes the means to obtain the objectives of article 2.¹¹⁸

In addition to satisfying articles 2 and 3, the November Agreement establishes a status quo that is consistent with article 86. A violation of article 86 occurs when an undertaking abuses a dominant position and the abuse adversely affects trade between Member States.¹¹⁹ The Commission opinion which followed the recent investigation of the Bundespost stated that Member States' postal and telecommunications authorities are commercial undertakings in dominant positions.¹²⁰ Application of the Commission's opinion to West Germany means that the Bundespost, under article 86, is an undertaking in a dominant position.¹²¹

Although the Commission's opinion is not binding, the Bundespost would probably not challenge its characterization as an undertaking, especially because West German law also recognizes the

116. See *supra* note 47 and accompanying text. Canada, the United Kingdom, and the U.S. have all expressly exempted private international couriers from their postal monopolies.

117. See E. KAUFER, *supra* note 1, at 13. Kaufert argues that eliminating private international courier service would make West Germany less attractive to foreign investors.

If West Germany is not able to offer access to all possible communication systems available in world trade, West Germany will lose its attractiveness as a target for foreign investment as well as its competitiveness in offering high-technology products. Foreign direct investment requires fast and reliable communication between mother- and daughter-corporations. If West Germany does not offer international courier service, foreign direct investment will relocate in those countries which do offer such courier services.

Id.

118. See *supra* notes 78-81 and accompanying text.

119. See *supra* note 82.

120. See *supra* text accompanying note 115.

121. See *id.*

Bundespost as a public undertaking.¹²² Similarly, the Commission's opinion that the Bundespost occupies a dominant position is virtually unassailable. Although "dominant position" has been accorded various meanings in the past,¹²³ a 1982 Commission ruling suggests one clear definition: an undertaking which enjoys a statutory monopoly necessarily occupies a dominant position.¹²⁴ Under this definition, the Bundespost occupies a dominant position by virtue of its statutory postal monopoly.

The remaining requirement to find an article 86 violation is a determination that the undertaking in a dominant position abuses its position in a fashion adversely affecting trade between the Member States.¹²⁵ Market domination alone is not the target of article 86; article 86 regulates market domination only when such a position is abused. Exact definitions of "abuse" have varied,¹²⁶ but, at a

122. German commentators have characterized the Bundespost as a public undertaking, reflecting the Bundespost's restructuring in the 1970's to achieve a more business-like operation. Leithäuser, *supra* note 67. Prior to the Commission's investigation, the Court of Justice of the European Communities had also indicated that it would construe the term "undertaking" broadly in order to enforce the general principles of the Treaty of Rome. *See Ex parte Sacchi*, 1974 E. Comm. Ct. J. Rep. 409, 441, 14 Comm. Mkt. L.R. 177, 203 (Case 155/73) (Court rejected an argument by the Italian government that, because the Italian television network performed a cultural and informational task in the public interest, it should not be considered an "undertaking" for purposes of the Treaty). Finally, "[t]he Treaty is satisfied only if the concept [of a public undertaking] covers every possible participation in the market on the part of the State." Schindler, *supra* note 86, at 60.

123. *See generally* R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION 226-40 (1970). The concept has undergone subtle changes under EEC law, but the emphasis remains on preventing accumulations of power in an undertaking that are inconsistent with the concept of an open, competitive market. *See, e.g., Sirena s.r.l. v. Eda s.r.l.*, 1971 C.J. Comm. E. Rec. 69, 10 Comm. Mkt. L.R. 260 (Case 40/70); *Deutsche Grammophon GmbH v. Metro-SB Grossmärkte GmbH*, 1971 C.J. Comm. E. Rec. 487, 10 Comm. Mkt. L.R. 631 (Case 78/70) (dominant position is the power to prevent the maintenance of effective competition in a substantial part of the relevant market); *Euremballage and Continental Can v. Commission*, 1973 E. Comm. Ct. J. Rep. 215, 12 Comm. Mkt. L.R. 199 (Case 6/72) (subtle shift to focus on competition's ability to enter market rather than an undertaking's power to exclude business); *United Brands Company v. Commission*, 1978 E. Comm. Ct. J. Rep. 207, 21 Comm. Mkt. L.R. 429 (Case 27/76) (focus on ability to act independently of competitors and consumers and thus to prevent effective competition).

124. *Re British Telecommunications*, 25 O.J. EUR. COMM. (No. L 369) 3640, para. 32 (1982) (official report of Commission decision). In *British Telecommunications*, the Commission found that certain telex restrictions imposed by British Telecommunications (BT) constituted an abuse of a dominant position under article 86. BT was a private corporation that, in 1981, became the legal successor to a statutory monopoly for telecommunications in the United Kingdom previously held by the United Kingdom Post Office. The Commission stated simply that "British Telecommunications has a statutory monopoly . . . [and] therefore holds a dominant position in the United Kingdom . . ." *Id.* at para. 26. *British Telecommunications* was the first case in which the Commission applied the EEC competition provisions to public enterprises. Comment, *The British Telecommunications Decision: Toward a New Telecommunications Policy in the Common Market*, 25 HARV. INT'L L.J. 229 (1984).

125. *See supra* note 82.

126. Article 86 itself offers a non-definitive list of situations where abuse may occur. *See supra* note 82. Article 86(b) suggests that restricting private courier operation would be an

minimum, article 86 covers abuse affecting the position of competitors and all other agents in the free market, as well as abuse affecting consumers.¹²⁷

Assuming that businesses require a fast, reliable delivery service to operate efficiently, any interference with courier service by the Bundespost may amount to abuse of a dominant position that adversely affects trade. The November Agreement establishes a relationship that prevents the Bundespost from interfering with the couriers' operations in this way. The Agreement may, in fact, serve to diminish the Bundespost's dominant position by placing Datapost and the couriers on equal footing.¹²⁸ Furthermore, consumers benefit through competition created by the Agreement; Datapost has no advantage by virtue of the Bundespost's statutory monopoly.¹²⁹ Although the Bundespost is clearly an undertaking in a dominant position, the Bundespost's status under the November Agreement complies with article 86 of the EEC Treaty.

The foregoing analysis establishes that the new status quo under the November Agreement is consistent with article 86 of the Treaty of Rome; the analysis also suggests that the previous February Agreement "adversely affected trade" and thus violated the Treaty. This consideration is important—even though the Bundespost has not suggested it would return to its previous position—because the November Agreement is non-binding.¹³⁰

The February Agreement contemplated an expansion of the postal monopoly that would gradually have eliminated private international courier service.¹³¹ Such an expansion would have restricted the choice of services which customers otherwise enjoyed.¹³² Restrictions on couriers would also have disadvantaged West German couriers that

abuse insofar as it limited the "market" of courier services available to the consumer. In *L'Oreal v. De Nieuwe*, 1980 E. Comm. Ct. J. Rep. 3775, 3794, 31 Comm. Mkt. L.R. 235 (Case 31/80), the Court characterized abuse as "methods [that are] different from those which condition normal competition on the basis of the transactions of traders, hinders the maintenance or development of competition and may affect trade between Member States." Thus, under the *L'Oreal* definition, restriction of private courier operation through an extension of the postal monopoly would be an abuse because it would impose conditions on the competitive market which are detrimental to the consumer.

127. 2 H. SMIT & P. HERZOG, *supra* note 79, at 3-264. See *Instituto Chemioterapico Italiano and Commercial Solvents v. Commission*, 1974 E. Comm. Ct. J. Rep. 223, 13 Comm. Mkt. L.R. 309 (Cases 6-7/73) (article 86 prohibits abuses which directly prejudice consumers as well as abuses which indirectly prejudice them by impairing the effective competitive structure as envisaged by article 3(f) of the Treaty).

128. See *supra* note 57 and accompanying text.

129. Datapost does, however, have non-legal advantages stemming from its relationship with Bundespost. See *infra* notes 151-52 and accompanying text.

130. See *supra* notes 93-97 and accompanying text.

131. See *supra* text accompanying note 7.

132. Elimination of private international couriers would leave consumers with no service other than Datapost. This Note maintains that the express service provided by a gov-

desired to provide the same services as their competitors elsewhere in the EEC.¹³³

Perhaps most offensively, interference with the couriers would have stifled development produced through the competitive process. The developments that followed the introduction of courier services suggest that when a new service is allowed to develop on the open market, innovation in other fields follows. Private airlines introduced courier services.¹³⁴ The West German Federal Railroad instituted operation of an InterCity courier.¹³⁵ Most recently, a completely new source of competition has emerged in the form of a "courier broker" industry. Operating in a manner similar to travel agents, courier brokers compare the various courier services and put together the most efficient package for its customers.¹³⁶ These developments, which grew naturally from the operation of private international couriers, would have been smothered under a strict interpretation of West Germany's postal monopoly. Given the Commission's inclination to find any detrimental effects on trade abusive,¹³⁷ the treatment of private international couriers in the November Agreement is the only possible interpretation of West Germany's postal monopoly consistent with article 86 of the Treaty of Rome.

Compliance with article 86, however, does not complete the analysis of the effects of the November Agreement; the Agreement must also be consistent with article 90 of the Treaty of Rome. Article 90 ensures that state-operated or state-granted monopolies do not enact or maintain measures "contrary to the rules contained in this Treaty."¹³⁸ Similarly, "[t]he development of trade must not be affected [by monopolies] to such an extent as would be contrary to the interests of the Community."¹³⁹

Commentators measure incompatibility with the Treaty in terms

ernment agency has significant administrative limitations and therefore constitutes a different service than that provided by private couriers.

133. See *supra* note 117.

134. See, e.g., *The Battle of the Overights*, Newsweek, Feb. 7, 1983, at 55, col. 2 (refers to service provided by a major airline). The Yellow Pages for any major city indicate that many commercial airlines have initiated courier service.

135. "InterCity" is the designation for express passenger trains which provide service between designated major cities. In West Germany, the federal railroad system (Bundesbahn) runs InterCity, accepting and delivering express documents in cities along its route.

136. See, e.g., Federal Express Service Guide, *supra* note 31. Federal Express has instituted a Referral Service to cover countries in which it has not yet established operations.

137. See *supra* notes 125-29 and accompanying text.

138. See *supra* note 86.

139. See *id.*

of effect on trade.¹⁴⁰ An agreement is incompatible with the Treaty if it could possibly hinder the attainment of a single market among Member States. Incompatibility is deemed to exist if it can be inferred "with a sufficient degree of probability that the agreement is directly or indirectly, actually or potentially capable of influencing trade."¹⁴¹ In applying this standard, the Court of Justice has indicated a willingness to interpret "effect on trade" broadly: the phrase includes an agreement that might possibly influence a pattern of trade so as to hinder the EEC's attainment of a single market.¹⁴² The Court of Justice has also held that an "effect on trade" exists even if the obstructed access to the market is confined to a single state, as long as the obstruction "is capable of affecting patterns of trade and competition in the Common Market."¹⁴³

The central concern of article 90, as evidenced by the Court of Justice opinions, is to prohibit undertakings with special or exclusive rights from preventing the realization of a single market between Member States. The Bundespost, prior to the November Agreement, had the exclusive right under the postal monopoly to deliver all written communications.¹⁴⁴ The Commission's investigation into the monopoly's relationship to private couriers indicated a possible violation of article 90: the Commission specifically noted that further expansion of the Bundespost's monopoly would have obstructed attainment of a single market.¹⁴⁵

Again, the Commission's opinion suggests that the February Agreement violated the Treaty of Rome, but that the November Agreement produces a status quo consistent with the Treaty. At least two facts support this conclusion. First, the November Agreement effectively creates and guarantees a new market for the couriers in West Germany; it therefore promotes realization of a single market by

140. See *Basic Competition Rules*, 2 COMM. MKT. REP. (CCH) ¶ 2011-03 (discussing Treaty of Rome, arts. 85, 86); see generally 2 H. SMIT & P. HERZOG, *supra* note 79, at 350-52.

141. *Basic Competition Rules*, *supra* note 140.

142. *Salonia v. Poidomani*, 1981 E. Comm. Ct. J. Rep. 1563, COMM. MKT. REP.(CCH) ¶ 8758 (Case 126/80). In *Salonia*, the E.C.J. held that an agreement providing for exclusive distribution of national products in the territory of a Member State—specifically, distribution of Italian newspapers and periodicals in Italy—"may have the effect of reinforcing the partitioning of the market on a national basis, thereby impeding the economic interpenetration which the Treaty is designed to bring about." 1981 E. Comm. Ct. J. Rep. at 1578.

143. *N.V. Nederlandsche Banden-Industrie Michelin v. Commission*, 1983 E. Comm. Ct. J. Rep. 3461, 3522, para. 103 (Case 322/81). Thus, if the E.C.J. did find incompatibility with the EEC Treaty in the Bundespost's interpretation of the postal monopoly, the E.C.J. could issue a directive compelling West Germany to resolve the incompatibility, Treaty of Rome, art. 90(3), even though the Bundespost's interpretation would only affect the operation of private couriers in West Germany.

144. See *supra* notes 23-24 and accompanying text.

145. See *supra* text accompanying note 115.

allowing private enterprise to penetrate the market.¹⁴⁶ Second, the termination of the Commission's investigation is some evidence of minimal compliance with Treaty provisions, including article 90.

D. FUTURE CONSIDERATIONS UNDER THE NOVEMBER AGREEMENT

The November Agreement eliminates several grounds for potential conflict and establishes a working relationship between the couriers and the Bundespost. The Agreement, however, also creates uncertainty with respect to two issues likely to arise in the future: Datapost's ability to compete with couriers and the applicability of the November Agreement to the telecommunications industry.

1. *The Future of Datapost*

The November Agreement expressly provides that Datapost and the couriers will compete with one another.¹⁴⁷ The European Commission's report further elaborated that "[t]he Bundespost has also given assurances that it does not intend to penetrate the market by charging below cost for its own express delivery service."¹⁴⁸ The guarantee of competition will be meaningless, however, if Datapost is unable to provide a service with enough "true courier" characteristics to satisfy consumer needs. As a service of the federal government, Datapost does not have the same operational flexibility as private international couriers. Datapost therefore has an inherent disadvantage in competing with the couriers for international business.

The Bundespost's agreement to compete with private international couriers, however, does not necessarily sound the death knell for Datapost. The Bundespost enjoys a long tradition of competence in mail delivery,¹⁴⁹ and consumers who are used to having the Bundespost provide general mail service may, out of habit, select Datapost when the need for express service arises. As a government agency, the Bundespost has a certain degree of natural visibility which should also benefit Datapost.¹⁵⁰

Moreover, even the couriers do not dispute that Datapost can offer an express service along with the Bundespost's general mail service. The Bundespost is free to enter into agreements with other

146. Compare the effect of the February Agreement. *See supra* notes 42-53.

147. Couriers' Letter of Nov. 30, 1984, *supra* note 54.

148. 18 BULL. E.C. 21 (pt. 1 1985). *See also supra* text accompanying note 115.

149. *See supra* notes 13-18.

150. Whatever efficiency problems the Bundespost may have experienced, *see generally* Leithäuser, *supra* note 67, the Bundespost's record as provider of standard mail services cannot be overlooked.

nations to provide a cooperative express service.¹⁵¹ International express mail agreements may prove necessary to make Datapost more competitive, even though such agreements cannot eliminate entirely the inherent bureaucratic inefficiencies that delay delivery. Not all consumers, however, will be concerned about the delays inherent in a cooperative system, and Datapost may compete very well by servicing those consumers for whom "time sensitive" means a matter of weeks rather than days.

Datapost is more likely to survive as a competitor under the November Agreement if the monopoly exemption continues to be narrowly confined to "true couriers."¹⁵² A broad interpretation of the exemption might allow private international couriers to creep into the market for domestic express mail service. Such encroachment would have a negative financial impact on Datapost, which currently enjoys the exclusive right to provide express mail service *within* West Germany. Enforcement of the domestic express mail monopoly could pose problems for the Bundespost since the Bundespost would be required to detain suspected violators to determine whether they are legitimate couriers. The November Agreement, however, anticipates this problem by requiring couriers to carry proof of their courier status.¹⁵³ In this way, the Agreement avoids a domestic enforcement problem and allows Datapost an equal opportunity to earn a profit on international routes.

2. *Applicability of the November Agreement to the Telecommunications Industry*

The November Agreement provides an immediate solution to one problem posed by modern technology under West Germany's postal monopoly, namely, the status of private couriers operating across national boundaries. The Agreement, however, does not address the problems created by similar services that also operate across national boundaries. In particular, the Agreement does not cover telecommunications regulation.¹⁵⁴ Discussion of this issue might have been expected because, in West Germany, the Bundespost administers both

151. See *supra* notes 30-31 and accompanying text.

152. See *supra* note 59.

153. See *supra* note 60.

154. Telecommunications regulation has been the subject of much scholarly discussion. See, e.g., Markoski, *Telecommunications Regulations as Barriers to the Transborder Flow of Information*, 14 CORNELL INT'L L.J. 287 (1981); Ramsey, *Europe Responds to the Challenge of the New Information Technologies: A Teleinformatics Strategy for the 1980's*, 14 CORNELL INT'L L.J. 237 (1981) (both articles were part of a symposium on teleinformatics published in that journal).

postal and telecommunications services.¹⁵⁵

"Telecommunications" encompasses a variety of services. Traditionally, the term has included telephone and telegraph services;¹⁵⁶ more recently, the term has become synonymous with telex and electronic facsimile transmissions.¹⁵⁷ Whether the Bundespost's monopoly extends to such services must be addressed by the parties who may again agree on a definition of the service provided.

The couriers are inclined to view telecommunications as inseparable from their current services. A top executive of a major courier company recently stated, "[I]nformation movement . . . has to be a joint courier-communications company undertaking."¹⁵⁸ The Bundespost may be content to allow couriers to provide telecommunications services. At the same time, they may update Datapost to compete in this new market. Regardless of the exact resolution of this issue, the cooperation and clarity evidenced by the November Agreement should enhance the parties' chances of obtaining an agreeable accord on telecommunications services.

CONCLUSION

The November Agreement, although not legally binding, establishes a status quo between the Bundespost, Datapost, and private international couriers that complies with both West German and EEC law. The Agreement recognizes the couriers' right to operate in West Germany and, at the same time, preserves the integrity of the national postal monopoly over standard mail service. The Agreement, however, is relatively limited in its scope and duration. Therefore, Datapost's actual competitiveness and survival, as well as the private international couriers' right to offer telecommunication services, remain uncertain. Although these issues are yet unanswered, the November Agreement and the means employed to achieve it bode well for the parties' prospects of reaching an agreeable resolution.

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155. See *supra* note 62 and accompanying text. The combined regulation of postal and telecommunications services is common throughout the world, e.g., in Great Britain, France, Italy, and Canada; the U.S. is an exception.

156. See, e.g., STATISTISCHES JAHRBUCH 1985, *supra* note 110, at 310 (Statistics for Postal and Telecommunications).

157. See, e.g., *An International Courier Takes on Federal Express*, Business Week, May 9, 1983, at 56, col. 2 (describing the entrance of DHL Worldwide Courier Express Network into the U.S. market). The article focuses on the international aspects of the courier's service.

158. *Id.*

